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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1951. No. 480.

PATERSON PARCHMENT PAPER COMPANY, a Corporation,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF PAPER MAKERS, and INTERNATIONAL BROTHERHOOD OF PAPER MAKERS, BRISTOL LOCAL No. 500, Unincorporated Associations,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The ruling of the District Court (164a, 165a) granting the respondents' motion for a directed verdict is not reported.

The opinion of the Court of Appeals, affirming the District Court's direction of a verdict for the respondents, is reported at 191 F. 2d 252.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 1, 1951 (R. 297a). On September 18, 1951, the Court of Appeals denied the petitioner's Petition for a Rehearing (315a).

The jurisdiction of this Court is involved under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Whether a collective bargaining agreement, providing that "should there be a delay in negotiating the new agreement, this agreement shall remain in full effect until such time as a new agreement is completed," continues in effect, by reason of this clause, after the expiration date of the agreement and after negotiations between the parties for a new agreement have reached a deadlock.

Whether a contractual provision providing that there will be no strikes as a result of any grievance until the arbitration procedure has been exhausted is violated by a strike after the termination of the contract, and after negotiations for a new contract have reached a deadlock.

Whether the arbitration provision of a collective bargaining agreement providing that "grievances, complaints or any other differences arising in the mill or in the interpretation of this agreement" shall be arbitrated requires arbitration of a dispute involving the life of that agreement, upon which issue the company started suit in this matter.

STATEMENT OF THE CASE.

This is an action by petitioner under Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 136, 28 U. S. C. 151 et seq. (Supp. 1950).

Petitioner is a corporation operating a paper mill at Bristol, Pa. Petitioner's employees are represented for purposes of collective bargaining by the respondent, Local 500 of the International Brotherhood of Papermakers, A. F. of L.

Petitioner and the respondent local were signatories to a collective bargaining agreement entered into on August 13, 1947 (6-16a). This agreement is also signed by the Regional Director of the respondent International Brotherhood of Papermakers, the parent union of respondent Local 500.

This agreement contains clauses, common to all labor agreements, providing for wages, hours of work, vacations, holidays, arbitration of grievances, and other such familiar items. Section 15 of the agreement, the clause around which much of the controversy here stems, provides as follows (16a):

> "This agreement shall be in effect from August 15, 1947 to August 15, 1948 and thereafter from year to year, provided, however, that either party may terminate the same on not less than sixty (60) days written notice given to the other prior to the anniversary date.
>
> However, should there be a delay in negotiating the new agreement, this agreement shall remain in full effect until such time as a new agreement is completed."

On June 1, 1948, in accordance with this clause, the Regional Director of the International wrote to the company (17a), notifying the company that Local 500 desired

to terminate the agreement and to negotiate a new contract for the coming year. The company replied to this letter (18a).

As a result of this correspondence, the parties met in an effort to negotiate a new contract (40a, 41a), the first meeting being held on July 8, 1948 (41a). Subsequent meetings were held (59a). At the first meeting on July 8, 1948, the respondent submitted its proposed entire new contract (41a, 187a-198a). At the fourth negotiation meeting on August 12, 1948, the company submitted its proposed entire new contract (51a, 52a, 199a-209a). The threat of a strike by the union was constantly present throughout these meetings and the company was aware of such a possibility. (The minutes of these negotiation meetings, as prepared by the company, were introduced into evidence by the respondents (212a-258a); they constitute a record of the course of the negotiations for a new contract.)

The negotiations continued through the months of July and August. At the meeting of August 17, 1948, the company made its final offer (257a). The local union, on August 20, 1948, voted to reject the offer and to go on strike (83a, 84a). The parties were at this stage obviously deadlocked, and an impasse in negotiations had been reached (68a, 76a, 89a, 90a).

The company was aware of the imminence of the strike even before this August 20 vote, because prior to August 20, 1948, the company had covered material which was used daily by the employees (69a), and had ordered that machines normally used be covered (85a, 86a). Further, even before the strike vote had been taken by the local union, the company and the union had discussed various arrangements as to the operation of the boiler room, the unloading of coal, and other maintenance operations, which were to continue during the imminent strike (70a, 72a).

On August 20, 1948, the employees went on strike (32a). The company, on October 20, 1948, filed its original complaint in the United States District Court for the Eastern

District of Pennsylvania. Its Amended Complaint was filed on December 20, 1948 (1a). The respondents' Amended Motion to Dismiss was filed December 24, 1948, and was denied on March 11, 1949 (1a).

The case was tried before the Honorable J. Cullen Ganey and a jury beginning November 6, 1950. On November 12, 1950, the trial judge directed a verdict for the defendants on the issue of liability (158a). Judgment was entered accordingly (289a).

The trial judge filed no written opinion. He explained his ruling orally (164a-165a).

The Court of Appeals for the Third Circuit (Judges Hastie, Biggs, and Staley) affirmed the judgment (297a). The Court's opinion was filed by Judge Hastie (293a-296a).

On September 7, 1951, the company filed a Petition for Rehearing (301a-314a). The Petition for Rehearing was denied (315a).

ARGUMENT.

I. SUMMARY OF ARGUMENT TO BE PRESENTED.

The decision of the Court of Appeals for the Third Circuit, affirming the direction of a verdict for the respondents, is not of such general importance as to warrant the granting of a writ of certiorari. However, that decision is clearly right; and the respondents will attempt to establish the correctness of that decision, and the fallacies in the petitioner's argument for the granting of a writ of certiorari. The respondents here will make no effort to raise every issue and argument that they have raised before; they will only attempt to answer the arguments raised in the Petition for Writ of Certiorari.

The petitioner does not bring to this Court (page 3, Petition for Writ of Certiorari) the question of the effect of the union's letter of June 1, 1948 (17a). Thus we are bound by the rulings of both the District Court and the Court of Appeals that this letter was an effective notice of termination (164a, 294a-295a), and the contract thus terminated as of its expiration date, August 15, 1948.

The error which the petitioner thus raises is the lower courts' interpretation of the second paragraph of Section 15 of the Collective Bargaining Agreement (16a). That paragraph is obviously directed at the negotiation period subsequent to the termination of the contract. When negotiations have been unsuccessfully completed, the parties having clearly reached a deadlock and an impasse, this clause cannot indefinitely continue the contract. The contract had been terminated and the union had the right to strike after the unsuccessful completion of negotiations.

Section 8(d) of the Labor-Management Relations Act of 1947 (29 U. S. C. 158 (d) Supp. 1950), has no application to this proceeding. That section provides that the duty to bargain collectively shall include the duty of sending certain notices in order to terminate or modify a collective bargaining agreement (Petition for Writ of Certiorari, pages 24-25). The failure on the part of a union to send such notices constitutes an unfair labor practice. The respondents have complied with this provision; a prosecution for any alleged violation of the provision is within the exclusive jurisdiction of the National Labor Relations Board.

The petitioners apparently attempt to argue that once the negotiations here between these parties continued past August 15, 1948, the expiration date of the contract, the respondents, in accordance with Section 8 (d), were required to give another sixty-day notice of termination to the petitioner in order to terminate the contract. There is absolutely no basis for such an argument in the terminology or the legislative history of Section 8 (d). Further, there is absolutely no conflict between the decision of the Court

of Appeals in this case and the decisions of other Courts of Appeals. To adopt the petitioner's argument is not only to do violence to the contract between the parties, the legislative history, and the statutory language, but also is to force every union to strike exactly on the expiration date of its contract for fear that any negotiation beyond that termination date may require it to send another sixty-day notice.

The strike was not a violation of Section 4 and Section 13 of this contract, the no-strike clause and the arbitration clause (9a and 14a and Petition for Writ of Certiorari, pages 25-27). The no-strike clause (19a) prohibited strikes until the arbitration procedure had been exhausted. The dispute over wages was not subject to arbitration (14a), and thus Section 4, the no-strike clause (9a) was not violated.

The petitioners apparently argue that the question of the effect of Section 15 on the continuation of the contract should have been submitted to arbitration. In the first place, Section 13, the arbitration clause, does not cover this kind of question. Secondly, this is the very question upon which the petitioner started an action against the respondents; it cannot be heard to say that the question it originally asked the court to decide should be decided by an arbitrator. Thirdly, the petitioner had the opportunity to attempt to take this question to arbitration when the question originally arose. Section 13 does not confine the right of arbitration exclusively to the union. Further, there is absolutely no conflict between the decision of the Court of Appeals in this case on this point and the decisions of other Courts of Appeals.

II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORDANCE WITH THE CONTRACT BETWEEN THE PARTIES.

The Collective Bargaining Agreement between the parties provided (Section 15, 16a) that it could be terminated

by a sixty (60) day notice of termination. Further, the contract stated that if there were a delay in negotiating a new agreement, the Agreement would continue in effect until a new agreement was negotiated.

Both the District Court and the Court of Appeals found, and the petitioner does not bring the question to this Court (Petition for Writ of Certiorari, page 3), that the respondents' letter of June 1, 1948, was a notice of termination, and the contract between the parties thus expired on August 15, 1948. Thus the question remains as to the effect of the second paragraph of Section 15 (16a).

The Petitioner apparently argues that the effect of this second clause was to continue the contract indefinitely, and if the union desired to terminate the contract again, it was required to send another sixty (60) day notice. Such an interpretation is not in accordance with the language of the contract or the intent of the parties.

This second paragraph of Section 15 obviously was not meant to continue this contract indefinitely. Its purpose was to continue the contract past its termination date when negotiations for a new agreement continued past that expiration. Certainly, it is desirable that parties should negotiate as long as possible in an effort to seek a peaceful resolution of their differences, even if their negotiation continues past the expiration date of the old contract.

It cannot be said, however, that the negotiation having passed the expiration date, the contract continues indefinitely. The respondents had exercised their option to terminate the agreement as of August 15, 1948, by their letter of June 1, 1948 (17a). When the negotiations continued past this August 15 expiration date, the second paragraph of Section 15 applied *only so long as the negotiations continued.* The contract terminated when the negotiations ended, whether they ended in a new agreement or as here had failed and were completely deadlocked. The Court of Appeals in its opinion recognized this fact (295a). The secretary and assistant treasurer of the company testified

that a deadlock had been reached and that the company would not change its position, or offer a further increase (68a and 76a). The president of the local union testified that the parties were deadlocked, and that the company stated it was not going to offer any more money (89a, 90a). In addition, the acts of the company in covering partially-finished products, used daily by the employees (68a, 69a) and in covering, and oiling machines, normally in operation (85a, 86a), all of which was done prior to the strike vote of August 20, 1948 (83a, 84a), show that the company had no intention of changing its position, or breaking the impasse which had developed.

In view of all the foregoing factors, this contract could not continue beyond the end of the negotiations. Such an interpretation would render useless the union's notice of termination of June 1, 1948, which was sent under Section 15 of the Agreement and which terminated the contract as of August 15, 1948. The obvious result of the petitioner's argument would be to force every union to strike exactly at the expiration date of its contract regardless of the possibilities of settling the dispute by a few more days of negotiations.

The decision of the Court of Appeals is eminently correct. Any other result would go beyond the language of the contract and the obvious intent of the parties.

III. THE DECISION OF THE COURT OF APPEALS IS IN ACCORDANCE WITH THE FEDERAL STATUTE AND IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The petitioner apparently argues in its Petition for Writ of Certiorari that the Court of Appeals here erred in ignoring Section 8 (d) of the Labor Management Relations Act of 1947, 29 U. S. C. 158 d (Supp. 1950). The petitioner argues that since the negotiations continued past its expira-

tion date, the contract could not be terminated by the union without compliance with Section 8 (d), which requires a sixty-day notice of termination. Thus, since no such notice was sent, the strike was a breach of contract.

There is absolutely no basis for such an argument in the contract, in the statute, or in the cases the petitioner has cited. The respondents have argued, and both the lower courts so held, that the contract could not continue past the completion of negotiations even under the most liberal interpretation of the second part of Section 15.

Section 8 (d), has no application to this situation. This section defines the duty to bargain collectively to include the sending of a written notice of a proposed termination of a contract to the other party to the contract sixty days prior to the expiration date thereof.

In the first place, Section 8 (d) does not make a strike called without compliance with its terms a breach of contract. Section 8 (d) merely makes such a strike an unfair labor practice on the part of the union and subjects the employees involved to the threat of replacement (29 U. S. C. 158 (d) (4) Supp. 1950), *In re Eisen*, 21 Labor Relations Reference Manual 2491 (N. Y. Sup. Ct. 1947). Further an alleged violation of Section 8 (d) is exclusively for the National Labor Relations Board to decide. A brief glance at the legislative history makes this clear. Senate Report No. 105 on S. 1126, 80th Congress, 1st Session, page 24 and the remarks of Senator Taft on the floor of the Senate, 93 Cong. Record 3955, April 23, 1947. See also Developments in the Law—The Taft-Hartley Act, 64 Harvard Law Review 781, at pages 841-43. Nowhere does the Taft-Hartley Act provide that the failure to comply with Section 8 (d) shall operate to extend the collective bargaining agreement. Failure to comply with Section 8 (d) constitutes an unfair labor practice, and has no bearing upon this action for breach of contract.

Secondly, the union has fully complied with Section 8 (d) here. The letter of June 1, 1948 (17a), was a notice of

termination, as both lower courts have held, and it was sent more than sixty days prior to the expiration date of the contract, August 15, 1948 (16a). It was sent in accordance with the contract between the parties (16a) and in accordance with Section 8 (d) (1), and it was sufficient to terminate the contract as of August 15, 1948.

But the petitioner argues that when the negotiations continued past the expiration date, the contract thus continued and in accordance with Section 8 (d), the union was required to give another sixty day notice of termination. No basis for this argument can be found in the statute or elsewhere. Section 8 (d) was never intended to require two notices of termination. Its purpose was to provide a peaceful period after a notice of termination had been sent during which the parties could settle their differences through collective bargaining.

The practical result of the petitioner's position is obvious. No union would dare continue to negotiate beyond the expiration date of an agreement, for fear that it would not be able to strike until it had sent another sixty-day notice of termination. Every union would be forced to strike exactly at the expiration date of an agreement, regardless of the fact that there was a possibility of settlement, if the parties could meet for several more days. No union would permit itself to be faced with the slightest possibility of an impasse and then have to wait another sixty days before it could strike. It would call a strike at the expiration date, even though such a practice might make more difficult the possibilities of ultimate settlement.

Further, as the respondents have argued, Section 8 (d) does not even make a strike which is in violation of its terms a breach of contract. Neither the statutory language nor the legislative history indicates that it was the intent of Congress to make such a strike any more than an unfair labor practice.

There is clearly no conflict between the decision of the Court of Appeals here and the decisions cited by the peti-

tioner. The Boeing cases, *Boeing Airplane Co. v. National Labor Relations Board*, 174 F. 2d 988 (C. A. D. C. 1949) and *Boeing Airplane Co. v. Aeronautical Industrial District Lodge No. 751, et al.*, 91 F. Supp. 596 (W. D. Wash. 1950), affd. Per Curiam, 188 F. 2d 356 (C. A. 9 1951), cert. denied 72 S. Ct. 39 (October 8, 1951), both involving the same facts, present an entirely different situation from that present in this case.

The contract in those cases provided that it would be in effect until March 16, 1947, "and thereafter until a new agreement has been reached by the parties either through negotiation or arbitration." The contract said nothing about notices required to terminate the contract which did not contain an expiration date, and no such notices were ever sent. The parties negotiated proposed changes in the contract at various times from October of 1946 until April 22, 1948. On the later date the employees of the company went out on strike.

The company then refused to recognize or deal with the union, and the union then filed with the National Labor Relations Board a charge of unfair labor practices by the company under Section 8 (a) (1) and (5) of the National Labor Relations Act. The Board found that the company had violated these sections and issued a cease and desist order. The company appealed the order of the Board to the Court of Appeals and that court's decision is reported at 174 F. 2d 988.

The Court of Appeals found that the company was not guilty of an unfair labor practice in refusing to bargain with the union because the union had not complied with Section 8 (d) and thereby had lost its status as the collective bargaining agent for the employees. Thus the company had no obligation to bargain with the union.

That case involved a situation where the union, without any advance notice to the company, as Section 8 (d) requires, went on strike. Section 8 (d) was expressly enacted to prevent strikes without advance notice to the com-

pany and to various governmental agencies. In this case, the union sent the notices required by its contract and by Section 8 (d), and only after its contract had expired and negotiations had reached a deadlock, did it go on strike.

The other Boeing case, *Boeing Airplane Company v. Aeronautical Industrial District Lodge No. 751, et al.*, 91 F. Supp. 596 (W. D. Wash. 1950), affd. Per Curiam, 188 F. 2d 356 (C. A. 9, 1951), cert. denied, 72 S. Ct. 39 (October 8, 1951), was an action by the company against the union for breach of contract because of the abovementioned strike. Both lower courts denied recovery for reasons not material here, though stating that the contract, never having been terminated, was in effect.

The strike in the Boeing case occurred during the term of a contract which had been extended by the failure of the parties to reach agreement. It was preceded by no notices or no attempts to terminate the contract; there was no evidence that any deadlock in negotiations had been reached. The strike there was in violation of an existing contract. In this case, the strike occurred after the contract had been terminated by proper notice, after Section 8 (d) had been complied with, and after negotiations for a new contract had reached a deadlock.

It is interesting to note that Judge Hastie, who wrote the opinion of the Court of Appeals in this case, was one of the judges on the Court of Appeals which affirmed in a per curiam opinion, 188 F. 2d 356, the judgment of the District Court, 91 F. Supp. 596, in the breach of contract action in the *Boeing* case. Certainly he was aware of the decision in the *Boeing* case, decided only a few months before the decision of the Court of Appeals in this case, and could see no conflict between the two cases.

IV. THE STRIKE HERE DID NOT VIOLATE THE NO-STRIKE CLAUSE OF THE CONTRACT AND THE ARBITRATION PROCEDURE OF THE CONTRACT DOES NOT APPLY.

The strike of August 20, 1948, was not a violation of Section 4 of the contract. That section (9a) provides that there shall be no strikes, etc. "until all other means and every effort have been exhausted to adjust them (grievances or disputes) through the regular procedure set up by this agreement." The union proposals at the negotiation of the new contract were not subject to "the regular procedure set up by this agreement"; the arbitration clause (14a), providing for the arbitration of "all grievances, complaints, or any other differences arising in the mill or in the interpretation of this agreement" was not applicable. These demands were not the kind of grievances which arose during the term of an agreement and which could be resolved by arbitration. The testimony of the petitioner's witness makes this clear (74a, 75a). Thus, since this strike did not concern questions that could have been resolved by arbitration under Section 13 (14a), Section 4 (9a) was not violated.

The petitioner argues on pages 20-21 of its Petition for Writ of Certiorari that the Court of Appeals erred in holding inapplicable Section 13 (14a) the arbitration clause of the contract. Exactly what issue the petitioner considers should have been arbitrated is not too clear; it appears to have been the question of the applicability of the second paragraph of Section 15 (16a). This issue is not even one which comes within the terminology of the arbitration clause.

When the contract expired, by reason of the union's notice of termination (17a), the arbitration clause, Section 13 (14a), expired also. Its provisions were not binding on the parties.

The question which the petitioner now claims should have been arbitrated is the very question upon which the petitioner itself started suit. The petitioner, having begun an action on the basis of the fact that the contract did not expire, cannot now be heard to say that it desires to have this question heard by an arbitrator.

Further, and most important, Section 13 (14a), the arbitration clause, does not prevent the company from bringing any question to arbitration. The company had the right to initiate the arbitration procedure, yet it never suggested or began any such proceedings on the question it now claims should have gone to arbitration.

The cases cited by the petitioner as being in conflict with the decision of the Court of Appeals on this point, *Shirley-Herman Co. v. International Hod Carriers*, 182 F. 2d 306 (C. A. 2, 1950), and *International Union v. Colonial Hardwood Flooring Co.*, 168 F. 2d 33 (C. A. 4, 1948), have no bearing on the issue raised by the petitioner. Both of these cases were actions for damages by an employer against a union which had gone on strike during the term of its contract despite a no-strike clause and an arbitration clause in the contract. In the *Shirley-Herman* case, the employer had offered to arbitrate both orally and in writing. The Court of Appeals affirmed a jury verdict against the union. The *Colonial Hardwood Flooring Co.* case was an appeal by the defendant union from an order refusing to stay an action for damages against it. The union had moved for a stay pursuant to Section 3 of the United States Arbitration Act, 9 U. S. C. A. 3. The Court of Appeals held that the claim of the employer for damages for breach of contract was not subject to arbitration and that the United States Arbitration Act did not apply.

A reading of these two cases, cited by the petitioners, will make clear that they have no application to this case. There is no conflict between them and the decision of the Court of Appeals in this case.

V. CONCLUSION.

For these reasons the respondents submit that this case does not warrant further review and pray that the petition for the writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 480.

PATERSON PARCHMENT PAPER COMPANY,
A CORPORATION,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF PAPER MAKERS, AND INTERNATIONAL BROTHERHOOD OF PAPER MAKERS, BRISTOL LOCAL No. 500, UNINCORPORATED ASSOCIATIONS,
Respondents.

PETITIONER'S MEMORANDUM CITING INTERVENING CONFLICTING DECISIONS OF SIXTH CIRCUIT

and

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Paterson Parchment Paper Company, hereby advises the Court of intervening conflicting decisions by the Court of Appeals for the Sixth Circuit, and also herein replies to respondents' Brief in Opposition.

I. The Intervening Decision of the Court of Appeals for the Sixth Circuit in International Union of Operating Engineers v. Dahlem Construction Company, Dated December 31, 1951, Is in Conflict With the Decision of the Court of Appeals for the Third Circuit in the Instant Case.

After the filing of the Petition for Certiorari in this case on December 17, 1951, the Court of Appeals for the Sixth Circuit, on December 31, 1951, filed its opinion in *International Union of Operating Engineers v. Dahlem Construction Company.*

That opinion is reported at 20 C. C. H. Labor Cases § 66,693, and the full text also appears *infra,* page 17, as an Appendix to this Memorandum and Brief.

The following excerpts from the headnotes of the *Dahlem* case make it clear that this most recent decision by the Court of Appeals for the Sixth Circuit is in conflict with the decision of the Court of Appeals for the Third Circuit in the instant case:

> (1) ". . . Where a collective bargaining agreement which contains a "no strike" clause continues in force by its own terms, the contracting union is not relieved of liability in a damage suit under the LMRA for a strike in breach of that agreement by reason of having given prior notice, even if that notice complies with the requirements of the amended NLRA. Moreover, the notice requirements of the amended NLRA are not satisfied where notice is not also given to the Federal Mediation and Conciliation Service and to any appropriate state mediation agency within thirty days after notice to the party to the agreement. Under such circumstances, the contracting union is liable for damages resulting from a strike."
>
> (2) ". . . Where an agreement containing such [no-strike] clause provides that, upon timely notice prior to the stated expiration date of a desire to modify

the agreement, it shall continue in full force and effect until modified by a new agreement, the "no strike" clause continues to be binding after the original expiration date if the contracting union has given such notice, at least until either party shall act unequivocally to terminate the agreement. The notice of proposed modification is not equivalent to a notice of termination, nor is the agreement terminated by a strike. Therefore, where the union, after giving notice of proposed modification of such agreement, goes on strike after the original termination date but without first terminating the agreement, it is liable for damages resulting from the strike in violation of the agreement."

The principal issue in the *Dahlem* case was the same as that involved in the case now under review by the Court, namely, whether despite Section 301 of the Taft-Hartley Act a union can with impunity go on strike during the existence of a collective bargaining contract providing in terms that the agreement shall remain in full force and effect until superseded by another agreement.

In the instant case, despite the contract's express provision that even timely notice of termination would not terminate it until a new contract had replaced it, the Court of Appeals for the Third Circuit actually held that such a contract was terminated by the strike and that the union was thereby insulated from liability for breach of contract under Section 301 of the Taft-Hartley Act.

In the *Dahlem* case, the Court of Appeals for the Sixth Circuit clearly held under parallel circumstances that "the strike did not constitute a termination of the contract" and that the union was liable for breach of contract.

In so holding, the Court of Appeals for the Sixth Circuit relied in part on *Boeing Airplane Company v. Aeronautical Industrial District Lodge No. 751*, 91 F. Supp. 596, affirmed 188 F. 2d 356, discussed at length and relied upon in the Petition filed in this case.

The instant case is stronger than either the *Dahlem* case or the *Boeing* case because here the contract specified that even a notice of termination would *not* terminate the contract until "a new agreement is completed" (R-16).

Whether the event which would terminate the original contract is to be agreement on an entire new contract or on modifications to the original contract, is immaterial. The point is that, until that event occurs, the original contract remains in effect, and a strike breaches it. Under the Sixth Circuit's *Dahlem* case and the Ninth Circuit's *Boeing* case,[1] the employer then has a cause of action under Section 301, whereas under the Third Circuit's decision in the instant case, the employer is denied that cause of action.

The cases clearly conflict on this fundamental point of federal law.

The *Dahlem* decision also emphasizes the validity of petitioner's contention that, irrespective of the Union's alleged partial compliance with the notice requirements of Section 8(d), where the contract itself binds the union not to strike until a new agreement had been completed, it is liable for damages caused by its strike.

There could be no more unambiguous language than the provision in Section 15 of this contract that, "should there be a delay in negotiating the new agreement, this agreement shall remain in full effect until such time as a new agreement is completed' (R-16). This is substantially identical to the *Dahlem* contract, providing, "Should such notice of a desire to modify the terms of this agreement be given by either party to the other, then this agreement shall remain in full force and effect until modified by a new agreement resulting from the negotiations."

The Sixth Circuit held that this language means what it says—that the original contract remains in effect until a

1. In the *Boeing* case, both the District Court (91 F. Supp. 596) and the Court of Appeals (188 F. 2d 356) held that the union, by its strike, had breached the contract. The employer was denied recovery only because of those courts' decisions that the company then rescinded the contract and thus lost its right to claim damages.

new agreement becomes effective and a strike before that time is an actionable breach, irrespective of any notice the union may have given. The Third Circuit, on the contrary, held that if the union gives notice during the original contract period it can terminate the contract by a strike, without liability, whenever it believes that further negotiation would be futile, despite the provision that the termination notice has no effect until "a new agreement is completed" and despite Section 301.

This conflict is also on a fundamental point.

This Court must make a choice between the Sixth Circuit's view, which would provide the industrial stability and peace which are the objectives of this statute, and the Third Circuit's view, which invites and will produce widespread economic warfare and interruptions in the flow of interstate commerce.

In holding that the conventional legal relief provided under Section 301 supplements the administrative relief provided under Section 8(d), (cf. *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corporation,* 20 Law Week 4082, 4083) the Court of Appeals for the Sixth Circuit also emphasized that, even "if appellant had complied with Section 158(d), 20 USC, that fact in no way rendered it immune from the damages resulting from the strike in violation of the contract". Thus, the *Dahlem* decision is doubly in conflict with the decision of the Court of Appeals for the Third Circuit in the instant case. That court perverted a notice which actually continued the contract indefinitely, into one which they held not only terminated the contract but also immunized the union from damages for its breach. The Sixth Circuit's contrary holding makes the conflict clear.

The Courts of Appeals for the Sixth, Ninth and District of Columbia Circuits have now agreed, contrary to the decision below, that when a union goes on strike during the existence of an interim contract of indefinite duration the

employer has a cause of action under Section 301 of the Taft-Hartley Act. Those courts' decisions make it clear that the legal consequences of such a strike do not depend upon *how* the contract of indefinite duration came into existence. A strike is a breach whether the original contract itself is one of indefinite duration (*Boeing*), or has been continued in effect until modifications have been agreed upon (*Dahlem*), or until a new contract is negotiated (*Paterson*).

And the fact that notice under Section 8(d) may have been given does not relieve the Union of liability for the strike. On this important statutory point the Third Circuit's conflict with the Sixth Circuit is clear.

The different approach employed by the other Courts of Appeals and the different result reached by them can be summarized in a few paragraphs:

(1) In *Boeing*, the contract provided that it should remain in full force and effect from March 16, 1946 to March 16, 1947 "and thereafter until a new Agreement has been reached by the parties either through negotiation or arbitration". Beginning in October, 1946, the parties negotiated; used the Federal Conciliation Service; reached an impasse; and finally, the union summarily rejected a new company offer and went on strike in April, 1948. All three courts which considered the question held that the union had breached the contract:

(a) The Court of Appeals for the District of Columbia held that the parties "were negotiating a new agreement and until such new agreement was reached the 1946 contract was in full force and effect", 174 F. 2d 988 at 990; "the strike of April 25 was a breach of the 1946 contract which was still in force on that date", Id. at 991; and the union's twenty-four hour notice was "not in compliance with the no-strike clause of the contract and, even assuming the existence of an interim contract, it was not sufficient notice under either the 1946 contract or the so-called interim contract", ibid.

(b) The District Court for the Western District of Washington said: "We hold (assuming there was no breach of the contract by the Company prior to April 22, 1948), that the work stoppage occurring on that day as a result of the acts of Lodge 751 was a material breach of the contract", 91 F. Supp. 596 at 609; and that "the strike was a material breach of the agreement (in the absence of a prior breach by the company) . . .", Id., at 611.

(c) The Court of Appeals for the Ninth Circuit said: "We have examined the entire record and are satisfied that the learned district judge correctly concluded, in the light of all of the circumstances of the case, that at the time immediately after the strike began when Boeing elected to terminate the contract, the union had been guilty of a material breach . . .", 188 F. 2d 356, 357. Recovery under Section 301 was denied only because the courts held the company had elected to rescind the contract and had lost its right to claim damages.

(2) In the *Dahlem* case, the contract provided that, after either party gave notice of a desire to modify the contract, "this agreement shall remain in full force and effect until modified by a new agreement resulting from the negotiations". After timely notice of a desire to modify the contract had been given, the appellant Union participated in negotiations but, upon failure to reach an agreement, went on strike. The Court of Appeals for the Sixth Circuit held that "the strike did not terminate the contract", citing the *Boeing* case, and "since the Contract was not terminated under Section 2 of Article 4, the no-strike clause remained in effect, was violated by appellant, and it became liable for resulting damages", 20 C. C. H. Labor Cases § 66,693, page 80,630.

In the case now under review, the contract provided that, even if timely sixty day notice of termination were given, if there should be "a delay in negotiating the new agreement, this agreement shall remain in full effect until such time as a new agreement is completed" (R-16).

The Union gave notice which petitioner does not believe to be adequate as notice of termination but which, even if it did constitute such notice, would only have the effect of bringing the above clause into play.

Negotiations continued past the stated termination date, August 15, 1948. Conferences were held on August 17, 1948 and August 20, 1948. The Union rejected a new company offer (which it later accepted, after a three-month strike, R-166) and walked out of the latter conference and onto the picket line. The Court of Appeals for the Third Circuit, without even mentioning Section 301 or any other section of the Taft-Hartley Act, absolved the Union from liability for damages, stating that, ". . . in accordance with the contract, termination was suspended by negotiations toward a new contract. These failed and ended. The old contract thereupon terminated pursuant to the permitted election already made manifest by timely notice as provided in the document itself. The obligation not to strike, like other obligations of the contract, ceased to exist. For this reason, the complaint was properly dismissed. Other points urged need not be considered."

This cavalier approach and chaotic result are shocking. They also disclose clear conflicts with the Sixth and Ninth Circuits, which require that certiorari be granted in this case, particularly in view of the nation-wide use of renewal and extension clauses, as indicated on Page 16 of the Petition for Certiorari.

II. The Intervening Decision of the Court of Appeals for the Sixth Circuit in Hamilton Foundry and Machine Company v. International Molders and Foundry Workers Union, Dated December 11, 1951, Is in Conflict With the Decision of the Court of Appeals for the Third Circuit in the Instant Case.

After the filing of the Petition for Certiorari in this case on December 17, 1951, there was reported on January 2, 1952 the decision of the Court of Appeals for the Sixth

Circuit in *Hamilton Foundry and Machine Company v. International Molders and Foundry Workers Union.* See page 2273 of United States Law Week dated January 2, 1952.

In that opinion, the Court of Appeals for the Sixth Circuit stated, *inter alia,* "We agree . . . that a state statute cannot change or diminish a substantive right created by a federal statute, . . . but a state statute is applicable where it deals with the remedy rather than with the substantive rights. . . . The Ohio Statute of Frauds affects the remedy only."

In contrast, as is emphasized in the Petition for Certiorari (Pages 12 to 17), the Court of Appeals for the Third Circuit in the instant case, relying solely on state law, has *nullified* the employer's federally-granted cause of action for breach of contract. The court below was not dealing merely with the remedy—it held that *no substantive right existed.* In so doing, it expressly stated (R-293) that it was applying only the law of Pennsylvania. It refused to apply the federal law. It then denied without opinion (R-315) petitioner's request (R-301) that it cite the Pennsylvania law which it purported to be applying. Thus, the Third Circuit, in the case at Bar, denied petitioner's federal rights on the ground that uncited Pennsylvania law not only governed those rights but also effectively abolished them.

The Sixth Circuit's contrary view on this point is also indicated in its opinion in the *Dahlem* case:

> ". . . Assuming, but not deciding, that the contract herein involved, after July, 1949, became a contract of indeterminate duration, appellant's contentions still are without merit. Kentucky law does not control, for Congress has occupied the field and has closed it to state regulation. *International Union of United Automobile etc. Workers v. O'Brien,* 339 U. S. 454."

Thus there is also a conflict on this point between these two Circuits, as well as between the decision under review

and the decision of this Court in *American Federation of Labor v. Swing*, 312 U. S. 321, 326, and in *International Union v. O'Brien*, 339 U. S. 454 and cases there cited.

This conflict also requires review of the decision below.

III. This Strike in Violation of the No-Strike and Arbitration Clauses Is Exactly the Type of Breach of Contract Made Actionable in the Federal Courts by Section 301 of the Taft-Hartley Act.

This Court said only yesterday that in enacting Section 301 "Congress was here concerned with reshaping labor-management legal relations; and it was taking precise steps to declared and announced objectives." *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corporation*, No. 280, October Term 1951, decided January 7, 1952, 20 Law Week 4082.

In that same decision, this Court pointed out that the Taft-Hartley Act represents "the uniform, national policy" which "has both administrative and conventional legal sanctions".

The decision below deliberately substituted an alleged contrary state-law policy in place of this high national policy—and permitted this union to defy the federal law with complete impunity. On facts which were substantially identical, the Courts of Appeals for the Second, Fourth, Sixth, Ninth, and District of Columbia Circuits found it necessary to carefully consider and decide the parties' rights and obligations according to the provisions of this federal Act. It is therefore readily apparent that the lower court in this case is not only in conflict with those Circuits but has acted in an arbitrary manner requiring the exercise of this Court's supervisory powers.

In considering the legal significance of the Union's actions in this case, there are some facts which must be kept in mind in assessing the parties' and the lower court's attitudes toward the Congressional scheme designed to foster industrial peace.

For example, in the Union's Brief in Opposition (Page 4), it is bluntly stated that "the threat of a strike by the union was constantly present throughout these meetings and the company was aware of such a possibility". Consequently, both the union and the lower court are extremely unrealistic in emphasizing the undenied fact that the company took certain precautionary measures during the last few days the plant was open. If the management had done otherwise, it would have been derelict in its duty to both the stockholders and the employees. The management had an obligation to protect the company's plant and equipment in the event of a strike, and it would have had no excuse for acting as though a strike were not likely, since "the threat of a strike by the union was constantly present".[2]

A similar indication of the Union's attitude was its failure to give the required notice to either state or federal mediators, even though its own threat of a strike was "constantly present". The Union's only reference to con-

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2. Discussing a strikingly similar situation, the Superior Court of Pennsylvania said, in *Climax Fire Brick Co. v. Board*, 166 Pa. Superior Ct. 481, 485-486:

". . . Ferrara was the agent of the Union and claimant's agent, and they were bound by his acts. As late as April 26, 1947, Ferrara, at a meeting at which claimant was present, informed Climax that 'the men will cease work on May fourth.' Climax had the right, even if it was not its obligation, to rely upon the positive statement of the Union's representative and claimant's agent. *Climax was not bound to act as though no strike would take place in the face of Ferrara's positive assertion to the contrary.* It was authorized to accept his assertion as an authentic expression of the definite policy of the Union, and to act accordingly. Relying upon his statement, Climax was permitted to make such preparation for meeting the exigency presented by the threatened strike as its managers in the exercise of good faith deemed necessary. *It was not required to await the actual and visible refusal of the employees to return to work.*

"Of course, an employer may not use a strike notice as a mere pretext for closing his plant and discharging his employees. He cannot secure a bargaining advantage by such means. Borrowing counsel's penetrating phrase, 'he cannot jump the gun on his employees.' But when a strike is imminent, *when an employer has been officially notified that a strike will occur, and has reasonable grounds for a belief that the strike will actually take place, he may, prior to and in anticipation thereof, take reasonably necessary measures to protect his property during the pendency of the strike.*" (Emphasis added.)

Substituting "Carella" for "Ferrara", and "Paterson" for "Climax" in the above statement of the law would make it exactly descriptive of this phase of the instant case. This alleged ground of justification for the decision below is frivolous.

ciliation which can be found in this record appears on Page 249, where a representative of the International stated, on August 16, 1948—60 days after the alleged notice of termination and only four days before the strike—"We have notified the Conciliator that we have a serious situation here." The union was the party planning to halt production, and yet it coldly ignored the public agencies established to prevent such disorders.

Moreover, although the union, even in this Court, attempts to convey the impression that the company made a "final offer" on August 17, 1948, it is clear from the Union's own record reference (R-257) that the company patiently encouraged further discussion.[3]

Similarly, the statement on Pages 3 and 4 of the Union's Brief in Opposition that the Union notified the company that it "desired to terminate the agreement and to negotiate a new contract for the coming year" is not borne out by the record. What the Union requested was "a meeting with the company for the purpose of discussing changes in the contract for the coming year" (R-17).

Furthermore, even respondents' statement as to the parties to this contract is inaccurate. The contract (R-6) is between the company and "the International Brotherhood of Paper Makers *and its* Bristol Local #500", and provides that "the Company recognizes the International Brotherhood of Paper Makers as exclusive bargaining agency . . ." This is considerably different from the statements on Page 3 of the Brief in Opposition that "petitioner and the respondent local were signatories" and "this agreement is also signed" by the International's "Regional Director."

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3. The record discloses the following statement by one of the company's negotiators:

> "I don't think the Company is of mind to say to you that there is no purpose in further negotiations. I believe negotiations between the Union and the Company should always continue," said Mr. Beechwood. "Possibly we may be a little more convincing next time or you may realize our position a little bit better. It may be we could have the Board of Directors take a gamble on something starting as of yesterday."

It is also important to note, contrary to the statement on Page 8 of the Union's Brief in Opposition, that the company has never admitted, in this Court or elsewhere, that the contract actually terminated on August 15, 1948. The company has, in this Court only, proceeded on the basis of the lower courts' decision that the union's letter of June 1, 1948 was a notice of termination. The company's position in this Court is that, even if that letter were notice of termination, under Section 15 such termination was suspended and the contract continued in effect, by its own terms, "until such time as a new agreement [was] completed".

Moreover, the Union's action in breaching this contract after only two conferences in the five days immediately following the originally specified termination date was not only unlawful but contrary to the Union's own By-Laws. They specify that "no strike order shall be issued by a subordinate Union unless and until the proposed strike is sanctioned by the International Executive Board" (R-273). Although the Local called the strike prior to authorization by the International (R-175), the International did later sanction the strike (R-178), advised every local throughout the United States to "get in there" and "give 'em Hell" (R-168, 169), and exulted in the fact that the company's factory had become a "perfectly paralyzed plant" (R-179).[4]

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4. The International Union clearly recognized that, under Section 4 of the contract (the "no-strike" clause), it is liable for any breach of contract. It proposed (R-221) to add the following to Section 4:

"It being understood and agreed that any strike not expressly authorized by the Union in accordance with the International Brotherhood of Paper Makers' Constitution, By-Laws, Standing Rules and General Laws as amended January 1, 1948, shall be deemed for all purposes, an unauthorized strike *for which there shall be no financial liability on the part of the International Brotherhood of Paper Makers,* its local Union, or the officers thereof." (Emphasis added).

The International fully realized the significance of Section 4 and the consequences of not having it amended to include the above proposal. The International's Regional Director said (R-244):

"This is merely a protection for the International so that we are not caught out on a limb," explained Mr. Daggett. Continuing, he said, "we will be responsible so far as we counsel, authorize,—or direct; but any-

Respondent argue on pages 9 and 11 of the Brief in Opposition that, if Section 15 should be construed to bind the union to its contract after the stated expiration date, no union would dare to negotiate at all after the stated expiration date of a contract and would be forced to strike on that date. The short answer is that if the union does not want to be so bound it should not sign a contract like this one providing that it "shall remain in full effect until such time as a new agreement is completed". But this Union not only *did* sign that contract, they drafted this clause and insisted on its being put into the contract (R-250). By its terms they *were* bound not to strike. They *did* so strike and Section 301 subjects them to liability for that breach.

As to Section 8(d), petitioner has made three points: (1) the Union did not abide by the notice requirements of that section; (2) even if it had, such compliance does not relieve it from liability under Section 301 for its breach of contract; (3) in appraising the legal significance of the Union's strike only five days after the stated termination date and in the face of the extension clause, the notice requirements of Section 8(d) are significant as a plain manifestation of the Congressional intention that labor agreements may not be abruptly and irresponsibly breached by any party.

This case illustrates the importance of that legislative policy and the stubbornness of this Union's flaunting of it. The Union did not call the mediators, as required by Section 8(d), thirty days before the stated termination date. The Union refused to continue work while further discussions went on, looking towards agreement on a new wage scale. They abruptly refused the same identical company offer (R-172) which, under the aegis of mediation,

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thing done without our knowledge or authorization, we definitely will not be."

Thus the union entered into this contract fully aware of its legal responsibilities, which it later ignored. It should not be permitted to escape its liability under the law for such a breach.

they accepted three months later (R-166). If they had carried out the Congressional policy, this costly interruption in the flow of interstate commerce could have been avoided. Having transgressed, they must now face the penalty under Section 301, and the lower court's decision to the contrary is not only erroneous on an important federal question but also in conflict with other Courts of Appeals.

The Union's Brief in Opposition is no answer to the Petition. It leaves untouched the validity of all the reasons for a Grant stated therein and in this Memorandum. It merely reflects and reiterates the Union's arrogant attitude that it can claim the benefits of a continuing contract one day and still be free to breach that contract the next day or any day it chooses to do so. It is not difficult to realize what the Union's position would have been if the company had been the one to walk out of the conference and close the factory on August 20, 1948. Cf. *Boeing Airplane Company v. National Labor Relations Board,* 174 F. 2d 988, 991.

This Court should review this case to settle the conflicts already discussed and to assure judicial enforcement of the legal rights recognized in this important federal statute.

Respectfully submitted,

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APPENDIX.

International Union of Operating Engineers, Local No. 181, Appellant, v. Dahlem Construction Company, Appellee.

United States Court of Appeals, Sixth Circuit. No. 11297. December 31, 1951.

On Appeal from the United States District Court for the Western District of Kentucky. Affirmed.

LABOR MANAGEMENT RELATIONS ACT—
NATIONAL LABOR RELATIONS ACT.

Damages for Breach of Collective Agreement—"No Strike" Clause—"Cooling Off Period" Notice—Section 301 of the LMRA which provides for damage suits for breach of collective bargaining agreements is entirely separate and distinct from the unfair labor practice provisions of the amended NLRA which require a sixty-day "cooling off period" notice prior to termination or modification of a collective bargaining agreement. Where a collective bargaining agreement which contains a "no strike" clause continues in force by its own terms, the contracting union is not relieved of liability in a damage suit under the LMRA for a strike in breach of that agreement by reason of having given prior notice, even if that notice complies with the requirements of the amended NLRA. Moreover, the notice requirements of the amended NLRA are not satisfied where notice is not also given to the Federal Mediation and Conciliation Service and to any appropriate state mediation agency within thirty days after notice to the party to the agreement. Under such circumstances, the contracting union is liable for damages resulting from a strike.

Damages for Breach of Collective Agreement—Strike in Violation of "No Strike" Clause—Termination of Agreement. Under Section 301 of the LMRA, an employer is entitled to recover damages for a strike in violation of a "no strike" clause in a collective bargaining agreement. Where an agreement containing such clause

provides that, upon timely notice prior to the stated expiration date of a desire to modify the agreement, it shall continue in full force and effect until modified by a new agreement, the "no strike" clause continues to be binding after the original expiration date if the contracting union has given such notice, at least until either party shall act unequivocally to terminate the agreement. The notice of proposed modification is not equivalent to a notice of termination, nor is the agreement terminated by a strike. Therefore, where the union, after giving notice of proposed modification of such agreement, goes on strike after the original termination date but without first terminating the agreement, it is liable for damages resulting from the strike in violation of the agreement.

Before ALLEN, MCALLISTER and MILLER, Circuit Judges.

[*Statement of Case.*]

ALLEN, C. J.: This action for damages was instituted under Sec. 185, 29 U. S. C., for violation of a contract between an employer and a labor organization representing the employees in an industry affecting commerce. The court directed a verdict for the plaintiff (appellee here), but ordered the jury to award such damages as were the direct and proximate result of the strike. The jury found the amount to be $1,850, for which judgment was entered and this appeal was then prosecuted.

The controlling question is whether under the applicable statutes appellant is liable for the damages proved. The case arises out of the following facts:

On July 15, 1948, the General Contractors Association, Inc., which represented certain general contractors in and around Louisville, Kentucky, including appellee, and the Louisville Building & Construction Trades Council, which was the bargaining agent for seven affiliated unions, entered into a written contract to which appellant was made a party by mutual consent. The contract covered wages

and other conditions of employment, and included arbitration of disputes and a no-strike clause. It also contained a provision to the effect that if either party gave written notice of a desire to modify any of the terms of the contract, negotiations should be entered into by the parties and in such case the agreement should remain in full force and effect until modified by a new agreement.

On March 4, 1949, the Building & Construction Trades Council gave written notice to the Contractors Association of its desire to modify articles 1, 2, 3, and 4 of the contract. On March 10, 1949, the Contractors Association gave the Building Trades Council written notice of its desire to modify article 2 of the contract pertaining to wages. Negotiations were entered into between the representatives of the Building Trades Council and the Contractors Association, and continued thereafter until September 3, 1949. July 28, 1949, the Contractors Association refused to agree to a wage increase; but the five unions working on appellee's building projects continued operations. July 29, 1949, the Contractors Association opened separate negotiations with appellant. During the period in controversy appellee had in its employ no member of appellant's union. August 11, 1949, the Contractors Association sent appellant a draft of a new contract which was refused, and on August 15 the appellant went out on strike. It placed pickets successively on five of appellee's construction jobs, causing them to remain at a standstill. As a result appellee was required to pay overtime, which would not otherwise have been necessary; to pay demurrage on railroad cars, perform unnecessary hauling, and to carry overhead without production. Appellant does not contend that the amount of damages allowed by the jury is excessive.

May 5, 1949, appellant sent to the Federal Mediation and Conciliation Service notice of the existence of the dispute, and later, on June 6, 1949, the Building Trades Council sent a similar notice to the Federal Mediation and Conciliation Service.

The action is based upon the contention that appellant breached its contract by going on strike August 15, 1949, without notice to appellee or to the General Contractors Association.

The applicable sections of the contract provide:

Article 3, section 3.

"Neither the Association, Association members, Councils or Unions signatory hereto shall engage in, permit, induce, or encourage any stoppage of work, slowdown, strike, lockout or concerted refusal to work by reason of any dispute or difference of opinion or policy between the parties hereto, save and except the failure of the other party to abide by a decision of the Joint Arbitration Committee, or a judgment of a Court of Law."

Article 4, section 2.

"This agreement shall be in full force and effect until the first day of July, 1949. Should either party hereto give written notice during the month of March, 1949, of a desire to modify any of the terms and provisions of this contract, negotiations will be entered into by the parties hereto for the renegotiation of this agreement. Should such notice of a desire to modify the terms of this agreement be given by either party to the other, then this agreement shall remain in full force and effect until modified by a new agreement resulting from the negotiations."

Appellant contends that it had the right to strike at any time after July 1, 1949, since it had properly given the 60-day cooling-off period notice provided for in Section 158(d), 29 U. S. C., quoted in the margin.[1] This statute does not absolve appellant of liability for its breach of the no-

1. [This footnote quoted Section 8(d) of the Taft-Hartley Act, which appears at Page 23 of the Petition for Certiorari in the instant case.]

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strike provision of its contract with appellee, for the reason (1) that appellant did not give notice in accordance with the express terms of Section 158(d); and (2) that this statute does not apply to actions for damages instituted under Section 185(a), 29 U. S. C.

[*Sufficiency of Notice.*]

On the first point, the Building Trades Council gave its notice to modify the contract on March 4, 1949. This was sixty days prior to the expiration date of the contract. On May 5, 1949, more than sixty days after the notice to modify was given to the Contractors Association, appellant notified the Mediation and Conciliation Service of the existence of the dispute. A similar notice was given by the Building Trades Council to the Mediation and Conciliation Service more than ninety days after the notice of modification was given. But Section 158(d), 29 U. S. C., requires that the notice be sent within thirty days after the notice of modification. This provision is mandatory. The purpose of enacting the statute was that industrial strife might be prevented by prompt action of the Mediation and Conciliation Service. If the Service is delayed in communicating with the parties and in offering mediation and conciliation, its efforts often will be frustrated. Since appellant and its representative, the Building Trades Council, did not comply with this mandatory provision, its defense upon this point is not sustained.

[*Application to Damage Suit.*]

Moreover, Section 158, 29 U. S. C., does not apply to an action for damages under Section 185, 29 U. S. C. The two statutes are included in totally separate divisions of the National Labor Relations Act, Section 158 being found in Subchapter II—National Labor Relations—and Section 185 being included in Subchapter IV—Liabilities of and Restriction on Labor and Management. Section 158 in its original

form was entitled "Unfair labor practices by employer defined" and included five paragraphs defining unfair labor practices which are written in the present statute. New definitions of unfair labor practices were included in the amended act and approximately two-thirds of Section 158 is devoted to such definitions. The paragraphs relied on by the appellant, (d) 1, 2, 3, and 4, were also added to Section 158, and the heading of the section is "Unfair labor practices." No provisions in Section 158 relate in any way to Section 185, the heading of which is "Suits by and against labor organizations—Venue, amount and citizenship." The wording of the statutes strongly supports the conclusion that even if the appellant had complied with Section 158(d), it would receive no immunity from a suit for damages for breach of contract under Section 185.

This conclusion is supported by the legislative history of the amendment to the Labor Management Relations Act made in 1947. The Senate amendments to the Act at one point contained a provision which defined the violation of the terms of the collective bargaining contract as an unfair labor practice. This provision was omitted by the Senate and House in conference, for the reason that "Once parties have made a collective bargaining contract the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board." House Conference Report No. 510, on H. R. 3020, 80th Cong. 1st Sess., 1947, pages 41 and 42. The striking out of the provision which defined violation of the contract as an unfair labor practice is strong evidence that Congress considered breaches of labor contracts to be separate and distinct from unfair labor practices, and intended that they should be separately handled by separate tribunals.

It follows that if appellant had complied with Section 158(d), 29 U. S. C., that fact in no way rendered it immune from the damages resulting from the strike in violation of the contract. The question therefore is whether the contract was in effect upon August 15, 1949, when appellant

struck. Appellant contends that the contract was terminable at will by unilateral action within a reasonable time after July 1, 1949, was terminated by it, and was not in effect when the strike was called. In support of this conclusion it cites *Boeing Airplane Co. v. National Labor Relations Board,* 174 Fed. (2d 988, 991 [16 LABOR CASES § 65,164] (C. A. D. C.), which holds that a contract of undetermined duration may become terminable by unilateral action on the part of either party after a reasonable time has elapsed. Appellant derives no assistance from this decision, for what the court actually held was that the contract could be terminated after proper notice; that the strike did not amount to termination; and it held the union liable for a material breach of the no-strike clause of the contract. This holding squarely supports the judgment of the District Court here.

[*Termination of Agreement.*]

What the unilateral act of termination is, which it claims caused the contract to expire, appellant does not clearly explain. The notices given by appellant to appellee were notices not of termination, but of a desire to modify the contract, and recognized that the contract was in full force. The secretary of the Building Trades Council stated in direct examination that the unions wanted an entirely new agreement; but on cross-examination he admitted that changes of all of the sections of each article of the contract were not desired, and refused to say how many sections the unions wished to have changed. The written notices addressed to the Mediation and Conciliation Service by the appellant and the Building Trades Council stated that a dispute existed between the parties, and made no mention of any desire to terminate the contract. But now it is contended that a notice of proposed modification is equivalent to a notice of termination; that Section 2, article 4, of the contract, providing that the agreement should re-

main in full force and effect during negotiations for modification did not come into play, and that the union therefore was not bound by the no-strike clause.

Such a construction would distort the express terms of the statute and run counter to several decisions construing it. A notice to terminate must be clear and explicit. *Texoma Natural Gas Co. v. Oil Workers International Union, etc.*, 58 Fed. Supp. 132; affirmed 146 Fed. (2d) 62 [9 LABOR CASES § 62,432] (C. A. 5), certiorari denied, 324 U. S. 872. A notice of modification is not a notice of termination and does not effect termination of the contract. *United Steel Workers of America v. Shakespeare Co.*, 84 Fed. Supp. 267 [16 LABOR CASES § 64,978]; *Mountain States Telephone & Telegraph Co.*, 81 Fed. Supp. 397 [15 LABOR CASES § 64,724]. The strike did not constitute a termination of the contract. *Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge No. 751,* 91 Fed. Supp. 596 [18 LABOR CASES § 65,845]; affirmed 188 F. (2d) 356 [19 LABOR CASES § 66,258].

Appellant relies on various Kentucky cases which hold that a contract for an indefinite time is terminable at will. This no doubt is the correct rule of law upon the general proposition. *Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge No. 751, supra.* Assuming, but not deciding, that the contract herein involved, after July, 1949, became a contract of indeterminate duration, appellant's contentions still are without merit. Kentucky law does not control, for Congress has occupied the field and has closed it to state regulation. *International Union of United Automobile etc. Workers v. O'Brien,* 339 U. S. 454 [18 LABOR CASES § 65,761]. In any case the Kentucky decisions give little comfort to the appellant, for they hold that a contract indefinite in duration and lacking mutuality is enforceable if executed. *Victoria Limestone Co. v. Hinton,* 156 Ky. 674, 676; *Johnson v. International Shoe Co.,* 228 Ky. 450, 452. In the instant case the contract was performed by all parties except appellant, including the carpenters, hod car-

riers, cement workers, truck drivers and laborers who endeavored to work for the appellee until prevented by appellant's picket lines. Since the contract was not terminated, under Section 2 of article 4 the no-strike clause remained in effect, was violated by appellant, and it became liable for resulting damages.

The judgment is affirmed.